Supreme Court, U.S.
FILED
991387 JAN 26 2000
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

STEPHEN L. LANGLIE,
Petitioner,

v.

ONAN CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

RECEIVED
JAN 27 2000
OFFICE OE THE CLERK
SUPREME COURT, U.S.

BETH E. BERTELSON *
DAVID J. SCHAIBLEY
BERTELSON LAW OFFICES, P.A.
101 UNION PLAZA
333 WASHINGTON AVENUE, NORTH
MINNEAPOLIS, MN 55401
(612) 278-9832

Counsel for Petitioner

* Counsel of Record

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

3100

QUESTIONS PRESENTED

ISSUE 1

The decisions by the Eighth Circuit in Houghton and Langlie, in which the Eighth Circuit denied a right to a jury trial under ERISA, are contrary to the Seventh Circuit's rulings in Grotteau, Senn and Bugher.

ISSUE 2

The Supreme Court must confirm that a private right of action exists for claims of retaliation under ERISA § 510.

ISSUE 3

The Eighth Circuit failed to recognize that the District Court did not follow the prevailing law when it issued a directed verdict on Petitioner's claim of retaliation under ERISA § 510.

PARTIES TO THE PROCEEDING

Petitioner

Stephen L. Langlie is an individual with no corporate affiliations.

Respondent

Onan Corporation, a division of Cummins Engine Company.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

ARGUMENT FOR GRANTING THE WRIT 5

ARGUMENT ONE
The decisions by the Eighth Circuit in Houghton and Langlie, in which the Eighth Circuit denied a right to a jury trial under ERISA, are contrary to the Seventh Circuit's rulings in Grotteau, Senn and Bugher 6

ARGUMENT TWO
The Supreme Court must confirm that a private right of action exists for claims of retaliation under ERISA § 510 8

ARGUMENT THREE
The Eighth Circuit failed to recognize that the District Court did not follow the prevailing law when it issued a directed verdict on Petitioner's claim of retaliation under ERISA § 510 10

CONCLUSION 14

APPENDIX

Appendix A
Eighth Circuit Opinion, September 30, 1999 . . 1a

Appendix B
District Court Order, August 7, 1998 . . . . . 8a

Appendix C
Eighth Circuit Order Denying Petition for Rehearing and Request for *En Banc* Review, November 2, 1999 . . . . . 9a

TABLE OF AUTHORITIES

Cases

Bugher v. Feightner,
722 F.2d 1356 (7th Cir. 1983), cert. denied,
469 US 822 (1984) 7

Burch v. Coca-Cola Co.,
119 F.3d 305 (8th Cir. 1997),
cert. denied, 118 S. Ct. 871 (1998) 10

Caudill v. Farmland Industries, Inc.,
919 F. 2d 83 (8th Cir. 1990) 10

Grotteau v. Sky Climber, Inc.,
79 F.3d 70 (7th Cir. 1996) 7, 8

In Re Unisys Plan Litigation,
74 F.3d 420 (3rd Cir. 1996) 8

Kinkead v. Southwestern Bell Telephone Co.,
49 F.3d 454 (8th Cir. 1995) 8

Langlie v. Onan Corp.,
192 F.3d 1137 (8th Cir. 1999) 6

McDonald v. Artcraft Elec. Supply Co.,
74 F.Supp. 29 (D.D.C. 1991) 7

McKelvey v. Canteen Corp.,
9 IER 642 (D. Md. 1994) 9, 12

McLean v. Carlson Companies,
777 F.Supp. 1480 (D. Minn. 1991) 8, 9

Mulholland v. Schneider Service Co.,
661 F. 2d 708 (8th Cir. 1981) 10

Reich v. Hoy Shoe Co., Inc.,
32 F.3d 361 (8th Cir. 1994) 12

Ryan v. Board of Police Com'rs,
96 F.3d 1076 (8th Cir. 1996) 10

Seidlitz v. Commissioner of Internal Revenue,
US Tax Court, Doc No. 334-99R
(August 13, 1999) 4, 6, 13

Senn v. United Dominion Indus. Inc.,
951 F.2d 806 (7th Cir. 1992) 7

Shirley v. Chrysler First, Inc.,
970 F.2d 39 (5th Cir. 1992) 12

Smith v. Riceland Foods, Inc.,
151 F.3d 813 (8th Cir. 1998) 11

Smith v. St. Louis University,
109 F.3d 1261 (8th Cir. 1997) 11-12

Stockmen's Livestock Market, Inc. v.
Norwest Bank of Sioux City,
135 F.3d 1236 (8th Cir. 1998) 10-11

UAW v. Midland Steel Products Co.,
771 F.Supp. 860 (N.D. Ohio 1991) 7

Vicinanzo v. Brunschwig & Fils, Inc.,
739 F.Supp. 882 (S.D.N.Y. 1990) 7

Weber v. Jacobs Mfg. Co.,
751 F.Supp. 21 (D.Conn. 1990) 7

Statutes and Rules of Court

28 U.S.C. § 1254(1) et seq. 1

28 U.S.C. § 1331 et seq. 4

28 U.S.C. § 2106 et seq 1

29 U.S.C. § 621 et seq. 7

29 U.S.C. § 1001 et seq. 2, 4

Federal Rules of Civil Procedure 50 3

42 U.S.C. § 2000e et seq. 7

42 U.S.C. § 12101 et seq. 7

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eighth Circuit is reported at 192 F.3d 1137 (8th Cir. 1999). A copy of the Opinion is included in the Appendix at Appendix A at la-7a. The Opinion of the District Court for the District of Minnesota was filed on August 6, 1998. A copy of the Opinion is included in the Appendix at Appendix B at 8a.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit issued its Opinion on June 18, 1999. On October 12, 1999, Petitioner filed a Petition for Rehearing *En Banc* which the United States Court of Appeals denied on November 2, 1999 (App. C at 9a).[1] This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. The Court's jurisdiction invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Article VI, Clause 2 Supremacy Clause.

---

[1] Citations to "App." are to the appendix filed with this Petition for Writ of Certiorari pursuant to Supreme Court Rule 14(i).

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution of Laws of any State to the Contrary notwithstanding.

* * * *

Employee Retirement Income Security Act
29 U.S.C. § 1001

Part 5 Administration and Enforcement

Sec. 510. Interference with Rights Protected under Act.

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this title, section 3001, or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this title or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this Act or the Welfare and Pension Plans Disclosure Act. The provision of section 502 shall be applicable in the enforcement of this section.

* * * *

Federal Rules Of Civil Procedure

Rule 50. Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings

19. Judgment as a Matter of Law.

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

STATEMENT OF THE CASE

The facts of this case are uncomplicated. Respondent employed Petitioner for over 35 years, ending in 1995. (App. la). During the last several years of Petitioner's employment, Respondent changed its pension plan - converting from a traditional pension to a "cash-balance pension." (App. 5a-6a). At the time, cash-balance pensions were all but unheard of on the public agenda. However, Petitioner immediately saw the unfairness that these pensions had on older, long-term employees reducing their pensions by over 75%. Petitioner reported this unfairness in correspondence and conversations with the Department of Labor, the Internal Revenue Service, the Equal Employment Opportunity Commission and members of Congress. Id.

After years of calling this illegality to everyone's attention, Petitioner finally succeeded. Recently the

Representative of the Commissioner of the Internal Revenue Service argued in United States Tax Court to have Respondent's pension plan disqualified. See Seidlitz v. Commissioner of Internal Revenue, US Tax Court, Doc No. 334-99R (August 13, 1999) (Answer of the Internal Revenue Service). All because Petitioner refused to sit by and watch Respondent steal his pension benefits.

In the meantime, however, Respondent felt pressure and "discomfort" from Petitioner's actions. Respondent became so concerned about Petitioner's protests that, as the jury agreed, Respondent constructively discharged him in December 1995.

In 1997 Petitioner filed a complaint in United States District Court for the District of Minnesota seeking redress for Respondent's violations of the Employee Retirement Income Security Act (hereinafter ERISA). The District Court had jurisdiction over the original action pursuant to 29 U.S.C. § 1001 and 28 U.S.C. § 1331 because the case presented a federal question arising under ERISA. Without a motion by Respondent, the District Court issued a directed verdict against Petitioner's retaliation claim under ERISA, stating that "it beggars the imagination" how it took [Respondent] several years to get rid of Petitioner after his pension protests began. (App. 6a). The District Court entered judgment on August 8, 1998. (App. 8a).

Petitioner timely filed an appeal with the Court of Appeals for the Eighth Circuit. On September 18, 1999 the Court of Appeals affirmed the District Court's judgment. Ignoring the facts and statutory provisions that make it illegal for an employer to retaliate against an individual who asserts rights under ERISA. The Panel for the Eighth Circuit determined that the ruling by the District Court was not

clearly erroneous. (App. 6a). The Court of Appeals based its conclusion on the fact that Petitioner's assertion of rights took place over a period of several years before being constructively discharged by Respondent. Id Furthermore, the Court of Appeals denied Petitioner a right to a jury trial under ERISA, and refused to reach the issue of whether a private right of action exists under ERISA. (App. 5a-6a). Petitioner's request for *en banc* review was denied on November 2, 1999.

ARGUMENT FOR GRANTING WRIT

ERISA § 510 expressly prohibits employers from retaliating against individuals who assert rights under that statute. The facts are undisputed that Petitioner asserted rights under ERISA. Petitioner wrote letters and lobbied to the Internal Revenue Service, the Department of Labor and members of Congress against what he believed to be Respondent's violations of ERISA. Respondent admits that Petitioner's tireless lobbying caused it "discomfort." Respondent, concerned that Petitioner's efforts would jeopardize its pension plan changes, constructively discharged Petitioner in an effort to silence his protests. Respondent's attempts to silence Petitioner failed. To this day, Petitioner continues to assert rights under ERISA.

Despite these facts, the District Court refused to allow a jury to consider whether Respondent constructively discharged Petitioner in retaliation for assertion of rights under ERISA. In doing so, the District Court stated that it "beggars the imagination" to conceive that a retaliation claim existed under these facts.

It does not "beggar the imagination" at all. Partly as a result of Petitioner's ceaseless protests, the Internal Revenue Service agrees that Petitioner's complaints had merit. See Seidlitz v. Commissioner of Internal Revenue, US Tax Court, Doc No. 334-99R (August 13, 1999) (Answer of the Internal Revenue Service). In Seidlitz, the Internal Revenue Service has requested that the United States Tax Court rescind Respondent's pension's tax exempt status and disqualify the plan amendments, effective as of January 1, 1989, and for plan years ending thereafter – the same pension plan changes about which Petitioner has been protesting for years.

The Supreme Court must remedy the District Court's error and allow a jury to determine whether Respondent constructively discharged Petitioner in retaliation for his assertion of rights under ERISA § 510.

ARGUMENT ONE

THE DECISIONS BY THE EIGHTH CIRCUIT IN HOUGHTON AND LANGLIE, IN WHICH THE EIGHTH CIRCUIT DENIED A RIGHT TO A JURY TRIAL UNDER ERISA, ARE CONTRARY TO THE SEVENTH CIRCUIT'S RULINGS IN GROTTEAU, SENN AND BUGHER.

The Eighth Circuit has held that "there is no right to a jury trial under ERISA." Langlie v. Onan Corp., 192 F.3d 1137, 1141 (8th Cir. 1999); citing Houghton v. SIPCO, Inc., 38 F.3d 953, 957 (8th Cir. 1994).

The Eighth Circuit is incorrect. The Seventh Circuit and District Court's have recognized the right to a jury trial

under ERISA. See e.g., Grotteau v. Sky Climber, Inc., 79 F.3d 70, 72 (7th Cir. 1996) (discussing that a "reasonable jury" could hear claims of retaliation under § 510); Senn v. United Dominion Indus. Inc., 951 F.2d 806 (7th Cir. 1992) (ruling that the Seventh Amendment requires a jury trial on the issue of whether defendants breached a collective bargaining agreement's retiree health obligation in violation of ERISA and LMRA); Bugher v. Feightner, 722 F.2d 1356 (7th Cir. 1983), cert. denied, 469 U.S. 822 (1984) (finding a right to a jury trial for an employee bringing claims under ERISA § 502(a)(3) and LMRA § 301); McDonald v. Artcraft Elec. Supply Co., 74 F.Supp. 29, 35 (D.D.C. 1991) (allowing a jury trial where an employer terminated an employee because the employer did not wish to continue paying medical benefits, and by analogizing ERISA claims to contract claims); UAW v. Midland Steel Products Co., 771 F.Supp. 860 (N.D. Ohio 1991) (noting that ERISA does not expressly preclude jury trials); Weber v. Jacobs Mfg. Co., 751 F.Supp. 21 (D.Conn. 1990) (ruling that under ERISA § 510, an employee is allowed a jury trial when alleging that his termination was due to an employer's interference with benefit rights); Vicinanzo v. Brunschwig & Fils, Inc., 739 F.Supp. 882, 886 (S.D.N.Y. 1990) (outlining that legal damages are not precluded by ERISA § 502).

Furthermore, claims for retaliation in violation of other statutes also allow for the right to jury trial. See e.g. 42 U.S.C. § 2000e et seq.; 29 U.S.C. § 621 et seq.; 42 U.S.C. § 12101 et seq.

The Supreme Court should remedy the conflict among the lower courts and confirm that ERISA § 510 allows for a right to a jury trial for claims of retaliation.

ARGUMENT TWO

THE SUPREME COURT MUST CONFIRM THAT A PRIVATE RIGHT OF ACTION EXISTS FOR CLAIMS OF RETALIATION UNDER ERISA § 510.

The Eighth Circuit refused to address whether a private right of action exists under ERISA for retaliation. Langlie, 192 F.3d at 1141 citing Rath v. Selection Research, Inc., 978 F.2d 1087, 1089 (8th Cir. 1992) ("It is an open issue in this Circuit whether § 510 protects informal complaints or protests relating to plan changes that a participant reasonably believes to be illegal.").

Protection under ERISA § 510 is available for an employee who "has given information or has testified or is about to testify in . . . a proceeding relating to [ERISA]." 42 USC § 1140. ERISA § 1132 provides for causes of action by participants injured by violations of the terms of an ERISA plan, wrongful discharge, and breach of fiduciary duty. See In Re Unisys Plan Litigation, 74 F.3d 420, 442 n. 17 (3rd Cir. 1996). Based upon this statutory framework, given that ERISA guarantees anti-retaliation protection (§ 510), and allows for a private right of action (§ 1132), surely, ERISA § 510 allows a private right of action for claims of retaliation. See e.g., Kinkead v. Southwestern Bell Telephone Co., 49 F.3d 454, 456 (8th Cir. 1995) (analyzing an employee-plaintiff's claims for retaliation under ERISA § 510 under the burden-shifting analysis); Grotteau v. Sky Climber, Inc., 79 F.3d 70, 72 (7th Cir. 1996) (discussing that "reasonable jury" could hear claims for retaliation under ERISA § 510 if a plaintiff survives summary judgment); McLean v. Carlson Companies, 777 F.Supp. 1480 (D. Minn. 1991) (recognizing that a plaintiff has recourse under ERISA § 510 for claims of

retaliation); McKelvey v. Canteen Corp., 9 IER 642 (D. Md. 1994) (allowing a plaintiff to amend his complaint to add claims of retaliation under ERISA § 510). The McLean court found that a retaliation claim under ERISA could exist where discharge was alleged to have been in retaliation for reports of suspected violations of ERISA:

> Plaintiff clearly would have recourse under § 510 had she been discharged in retaliation for commencing a legal action against defendant to correct what she perceived to be violations of ERISA. In view of the express authorization which plaintiff possesses under ERISA to sue to remedy violations of ERISA, the court finds it logical to infer that plaintiff also possesses the right to inform plan administrators of suspected violations of ERISA. The opposite conclusion would provide a strong incentive to plan participants to institute litigation with out first attempting to resolve the issue informally. As well, it would seem anomalous for the court to prohibit actions by plaintiffs who allege to have been discharged for reporting violations of ERISA to their employers while concurrently permitting actions by those who seek to remedy the same violations through legal action.

See 777 F.Supp. at 1484.

Similar to the employees in McKelvey and McLean, Petitioner questioned Respondent's pension changes. Petitioner's opposition to Respondent's pension changes was a right protected under ERISA. Respondent met Petitioner's

challenges to its pension changes with numerous adverse acts -- and as the jury recognized, they constructively discharged Petitioner.

As such, the Supreme Court should recognize a private right of action for claims of retaliation under ERISA § 510.

ARGUMENT THREE

THE EIGHTH CIRCUIT FAILED TO RECOGNIZE THAT THE DISTRICT COURT DID NOT FOLLOW THE PREVAILING LAW WHEN IT ISSUED A DIRECTED VERDICT ON PETITIONER'S CLAIM OF RETALIATION UNDER ERISA § 510.

A. The Eighth Circuit Failed To Follow The Standard For Directed Verdicts.

The prevailing law outlines that a directed verdict is appropriate only "where the evidence is such that . . . there can be but one reasonable conclusion as to the verdict." Caudill v. Farmland Industries, Inc., 919 F. 2d 83, 86 (8th Cir. 1990), citing Mulholland v. Schneider Service Co., 661 F. 2d 708 (8th Cir. 1981). As such, the court must "view the entire trial record in the light most favorable to the non-movant, drawing reasonable factual inferences in its favor," Burch v. Coca-Cola Co., 119 F.3d 305, 313 (8th Cir. 1997), cert. denied, 118 S. Ct. 871 (1998); see also Ryan v. Board of Police Com'rs, 96 F.3d 1076, 1084 (8th Cir. 1996). The cause of action must be submitted to the finder of fact "if there is any substantial evidence to sustain" it. Stockmen's Livestock Market, Inc. v. Norwest Bank of Sioux City, 135

F.3d 1236, 1240 (8th Cir. 1998). Petitioner presented substantial evidence to support his claim of retaliation. Despite this, the District Court granted a directed verdict against Petitioner's claim of retaliation.

In making its decision, the District Court looked at only one fact – the duration and timing of Petitioner's complaints – when compared with his constructive discharge. See Langlie, 192 F.3d at 1141 (stating that "it beggars the imagination" how it took Respondent several years to get rid of Petitioner after his pension protests began).

Contrary to the District Court's circumspect view of the facts, more than one reasonable conclusion can be reached based upon the evidence Petitioner set forth in support of his claim for retaliation as outlined below.

B. More Than One Conclusion Can Be Reached In Reviewing Whether A Causal Connection Existed Between Petitioner's Reports And His Constructive Discharge.

The District Court directed a verdict against Petitioner's claims for retaliation because the Court believed that due to the duration of Petitioner's complaints, no causal connection could exist between Petitioner's complaints and his constructive discharge. However, the prevailing law directs that such a causal link may be shown not only through proximity in timing, but also through other implications of retaliatory motive. See Smith v. Riceland Foods, Inc., 151 F.3d 813, 820 (8th Cir. 1998) (noting that a causal connection can be shown by demonstrating management knowledge about complaints, and discussions between the plaintiff and management about plaintiff's protected activities); Smith v.

St. Louis University, 109 F.3d 1261, 1266 (8th Cir. 1997) ("The passage of time between events does not by itself foreclose a claim of retaliation.") (emphasis added); Reich v. Hoy Shoe Co., Inc., 32 F.3d 361, 368 (8th Cir. 1994) (agreeing that once an employer has knowledge that an employee made complaints to an outside agency, "[I]t is beyond question that the employers make employment decisions based upon what they actually know to be true."); Shirley v. Chrysler First, Inc., 970 F.2d 39, 42 (5th Cir. 1992) (outlining that the "consideration of [time] is part of our analysis [in finding a causal connection], but not in itself conclusive of our determination of retaliation."); McKelvey v. Canteen Corp., 9 IER 642, 643 (D. Md. 1994) (agreeing that time is but one factor in determining the existence of a causal connection). In Petitioner's case, the District Court ignored the prevailing law, and issued a directed verdict holding that lapse of time, standing by itself, absolved Respondent of liability.

The District Court focused on a complaint of age discrimination and retaliation made by Petitioners in 1984. However, Petitioner's complaints about the pension changes did not begin until 1988. Furthermore, while Petitioner began to question the pension changes in 1988, his protected activities continued and intensified in 1995 – at which time the IRS and the Department of Labor began to take notice of Petitioner's reports.

Petitioner asserts that the timing of his intensified complaints in 1995 coincided close in time to his constructive discharge later that same year. As such, a reasonable conclusion is that once Respondent realized that Petitioner's contacts with the IRS in 1995 could cause problems in its pension changes, they quickly terminated him.

While Respondent initially attempted to ignore Petitioner's pension protests, it could not do so indefinitely. Respondent admitted that it eventually started to feel "discomfort" from Petitioner's actions. Respondent also admitted that it considered Langlie to be "litigiously inclined" because of his reports to governmental agencies. Respondent became so concerned that Langlie's reports to the IRS and Department of Labor might actually be effective, that they attempted to silence Petitioner by constructively discharging him.

To Respondent's surprise, however, Petitioner continued to press his cause even after his constructive discharge. Finally, the Internal Revenue Service agreed with Petitioner that Respondent's pension changes did not comply with IRS requirements. See Seidlitz v. Commissioner of Internal Revenue, US Tax Court, Doc No. 334-99R (August 13, 1999) (Answer of the IRS requesting that the Tax Court rescind Respondent's pension's tax exempt status and disqualify the plan amendments, effective as of January 1, 1989, and for plan years ending thereafter).

It does not "beggar the imagination" at all that Respondent terminated Petitioner because he was complaining about Respondent's pension changes. Respondent masked its pension changes, believing that its employees could not see through the pension theft put in place by the cash-balance pensions. However, to Respondent's consternation, Petitioner saw through the intricately conceived mask. Because Petitioner did not give up his fight for fairness related to his pension, Respondent terminated him. Merely because Respondent tried to ignore Petitioner until 1995 before it attempted to silence his complaints does not eliminate the fact that a causal connection exists between Petitioner's protest and his constructive discharge.

Based upon the evidence Petitioner presented to the Court, it is reasonable to conclude that Respondent discharged Petitioner because of his reports to the IRS and the Department of Labor complaining about the pension changes. As such, it was improper and against the prevailing law for the District Court to issue a directed verdict on Petitioner's claims of retaliation under ERISA § 510.

The Supreme Court should recognize the Eighth Circuit's failure to reinforce the prevailing law related to directed verdicts, and should grant Petitioner's Petition for a Writ of Certiorari on this issue.

CONCLUSION

Based upon the foregoing, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

/s/_____

Beth E. Bertelson (#186806)
David J. Schaibley (#279250)
Attorneys for Petitioner
101 Union Plaza
333 Washington Ave. North
Minneapolis, MN 55401
(612) 278-9832

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

[Filed September 30, 1999]

No. 98-3638

Stephen L. Langlie,	)
Plaintiff- Appellant,	)
	)
v.	)
	)
Onan Corporation,	)
Defendant - Appellee.	)
	)

Submitted: June 18, 1999

Appeal from the United States
District Court for the
District of Minnesota.

Before LOKEN, BRIGHT, and ROSS, Circuit Judges.

LOKEN, Circuit Judge.

In late 1995, Onan Corporation implemented a reduction in force and eliminated the position of Stephen L. Langlie, a 62-year-old employee. Langlie commenced this

action, alleging unlawful age discrimination and retaliation. After trial, a jury found that Langlie was not discharged on account of his age, and the district court[1] found insufficient evidence of unlawful retaliation. Langlie appeals, arguing there was overwhelming evidence of age discrimination and retaliation for his years of informal protests against adverse changes in Onan's pension plan benefits. He also argues there were prejudicial evidentiary and jury instruction errors by the district court. We affirm.

I. The Jury's Age Discrimination Verdict.

Langlie argues the district court erred in denying his post-trial motion for judgment as a matter of law or a new trial because the jury verdict is contrary to the great weight of evidence showing that age was a motivating factor in Onan's decision to eliminate Langlie's position. We review the evidence in the light most favorable to the jury's verdict and affirm unless that evidence "is susceptible of no reasonable inference sustaining the jury's determination." Jones Truck Lines, Inc. v. Full Service Leasing Corp., 83 F.3d 253, 257 (8th Cir. 1996). Our focus is primarily on the jury's resolution of the ultimate question of fact -- whether Onan intentionally discriminated against Langlie on account of his age. See Ryther v. Kare 11, 108 F.3d 832, 849 (8th Cir.) (en banc) (Loken, J., writing for a majority on this issue), cert. denied, 521 U.S. 1119 (1997).

---

[1] The HONORABLE JAMES M. ROSENBAUM, United States District Judge for the District of Minnesota.

Onan presented evidence that, after its parent company mandated a ten percent reduction in force, Onan decided to eliminate one engineering position in Langlie's department. Langlie was chosen after an objective evaluation of all the engineers because he had a relatively low performance ranking, his projects were substantially completed, and he lacked design and computer skills necessary for future work. There was evidence that Langlie survived earlier reductions in force in 1985, 1989, 1992, and 1994 in which younger employees were terminated. In addition, when Langlie refused to move with his department to Alabama in 1993, Onan transferred him to another department rather than terminate him. Langlie presented evidence that he was qualified to replace another engineer, his projects were not substantially completed, he had a favorable performance review in April 1995, and Onan's performance rankings for the reduction in force were subjective. He also testified that Onan denied him computer training it made available to younger employees and delayed providing updated computer equipment. Viewing the trial evidence as a whole, we agree with the district court that the evidence was more than sufficient to permit the jury reasonably to find in favor of Onan on Langlie's age discrimination claim. See generally Holley v. Sanyo Mfg., Inc., 771 F.2d 1161 (8th Cir. 1985). His motion for judgment as a matter of law or for a new trial was properly denied. See Jones Truck Lines, 83 F.3d at 258 (denial of new trial based on sufficiency of the evidence is "virtually unassailable on appeal").

II. The Disparate Impact Directed Verdict.

Langlie appeals the district court's refusal to submit his disparate impact age discrimination claim to the jury.

Disparate impact claims challenge "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one [protected] group . . . without adequate justification." Houghton v. SIPCO, Inc., 38 F.3d 953, 958 (8th Cir. 1994). "To prove discrimination under this theory, a plaintiff must identify . . . a facially-neutral employment practice, demonstrate a disparate impact upon the group to which he or she belongs, and prove causation." Lewis v. Aerospace Community Credit Union, 114 F.3d 745, 750 (8th Cir. 1997), cert. denied, 118 S.Ct. 1392 (1998). To prove a prima facie case of causation, "plaintiff must offer statistical evidence of a kind and degree sufficient" to raise an inference that the practice in question has caused significant adverse effects on the members of a protected group because of their membership in the group. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988).

On appeal, Langlie relies upon the trial testimony of his expert statistician, who analyzed Onan's terminations between 1992 and 1997 and opined that older engineers were involuntarily terminated more often than would be expected compared to Onan's younger engineers. However, Langlie failed to link this testimony to a facially neutral employment practice. He refers in his brief generally to Onan's reduction-in-force decisions, citing Thomas v. First Nat'l Bank of Wynne, 111 F.3d 64, 66 (8th Cir. 1997). But he was terminated in the 1995 reduction. Statistics based upon all terminations from 1992 to 1997 do not measure the impact on Onan's work force of that specific reduction, and Langlie has not cited evidence that the 1995 reduction in force had a disparate impact on Onan's older employees. To the extent that he also relies on the distinct argument he made to the

district court -- that Onan's use of performance improvement plans had a disparate impact on its older workers -- we agree with the court that he did not prove a substantial statistical disparity. Thus, we agree with the district court that Langlie failed to present a prima facie case of disparate impact discrimination.

III. The ERISA Retaliation Claim.

In the late 1980's, Onan made changes to its pension plan. Langlie filed a complaint with the Minnesota Department of Human Rights and then became a leader of a group of employees who complained internally to Onan management that these changes would reduce the pension benefits that Onan previously led its older workers to expect. When Onan did not rescind the changes, the group took their complaints to the United States Department of Labor, the Internal Revenue Service, the EEOC, and members of Congress. These protest activities continued into 1995, the year of Langlie's termination. He claims that the termination violated § 510 of the Employees Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1140, which provides that it is unlawful "to discharge . . . a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan."

It is an open issue in this Circuit whether § 510 protects informal complaints or protests relating to plan changes that a participant reasonably believes to be illegal. See Rath v. Selection Research, Inc., 978 F.2d 1087, 1089 (8th Cir. 1992). After considering Langlie's evidence at trial, the district court assumed that § 510 provides a claim for retaliation based on informal protests and ruled that Langlie's

claim fails because there is insufficient evidence Onan retaliated against Langlie for his years of protesting Onan's pension plan changes. "[I]t beggars the imagination," the court explained, "that it took [Onan] years to get rid of a troublemaker if the troublemaker they were unhappy about was complaining about an ERISA plan."

On appeal, Langlie argues that § 510 encompasses retaliation against informal complaints and protests and therefore his retaliation claim should have been submitted to the jury. However, there is no right to a jury trial under ERISA. See Houghton, 38 F.3d at 957. The district court found that Langlie was not terminated in retaliation for his complaints about pension plan changes. This finding is not clearly erroneous given the evidence that Langlie began to question pension changes in 1988 and survived numerous reductions in force in the ensuing years despite continuing his informal but vigorous protests. See Figgous v. Allied/Bendix Corp., 906 F.2d 360, 362 (8th Cir. 1990) (standard of review). Accordingly, without reaching the issue of law we left open in Rath, we affirm the dismissal of Langlie's ERISA retaliation claim.

IV. Instruction and Evidence Issues.

Langlie argues the district court erred in instructing the jury, "You may not return a verdict for plaintiff just because you might disagree with defendant's conduct or believe it was harsh or unreasonable." This is Instruction 5.94 from the MANUAL OF MODEL CIVIL JURY INSTRUCTIONS FOR THE EIGHTH CIRCUIT (1998), the Business Judgment instruction. We have expressly held that, in employment discrimination and retaliation cases, "a business judgment

instruction is crucial to a fair presentation of the case, and the district court must offer it whenever it is proffered by the defendant." Scamardo v. Scott County, 1999 WL 619056, at *3 (8th Cir. Aug. 17, 1999). The district court did not abuse its discretion in giving this instruction and in declining to give additional instructions proposed by Langlie.

Langlie argues the district court abused its discretion by limiting employee testimony about adverse treatment by Onan, excluding charts prepared by Langlie showing the adverse impact of Onan's practices on employees over forty, excluding evidence of Onan's hiring and firing of employees in 1996, and restricting his testimony relating to pension plan protesting. However, with the exception of one letter to a United States Senator, which was excluded as cumulative or irrelevant hearsay, Langlie does not cite to the record where he offered this evidence, as Fed. R. App. P. 28(a)(7) requires. Therefore, he has not established that the court committed a clear and prejudicial abuse of discretion. See Hastings v. Boston Mut. Life Ins. Co., 975 F.2d 506, 510 (8th Cir. 1992) (standard of review).

The judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

[Filed August 7, 1998]

No. 97-CV-239 (JMR/FLN)

Stephen L. Langlie,
Plaintiff,

v.

Onan Corp.,
Defendant,

ORDER

On August 6, 1998, the jury returned a verdict in favor of the defendant, Onan Corp. The Clerk of Court is hereby instructed to enter judgment in favor of the defendant in this matter.

IT IS SO ORDERED.

Dated: August 6, 1998

/s/
JAMES M. ROSENBAUM
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[Filed November 2, 1999]

No. 98-3638MNMI

Stephen L. Langlie, *Appellant*,	)
v.	)
Onan Corporation, *Appellee*.	)

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

November 2, 1999

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

FILED
MAR 23
CLERK

No. 99-1387

In The Supreme Court of the United States

STEPHEN L. LANGLIE,

Petitioner,

v.

ONAN CORPORATION, A DIVISION OF CUMMINS ENGINE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

John M. Anderson
Counsel of Record
Charles E. Lundberg
Bassford, Lockhart, Truesdell & Briggs, P.A.
3550 Multifoods Tower
33 South Sixth Street
Minneapolis, MN 55402
(612) 333-3000

Attorneys for Respondent

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

Onan Corporation is a wholly-owned subsidiary of Cummins Engine Company. No publicly-held company owns ten percent or more of the stock of Cummins Engine Company.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

REASONS FOR DENYING THE WRIT 1

Since The District Court Properly Granted A Directed Verdict On The Retaliation Claim, This Case Does Not Present A Proper Occasion To Address The Legal Issues Argued In The Petition 3

CONCLUSION 8

TABLE OF AUTHORITIES

Cases: **Page**

Bugher v. Feightner,
722 F.2d 1356 (7th Cir. 1983) 7

Figgous v. Allied/Bendix Corp.,
906 F.2d 360 (8th Cir. 1990) 6

Jackson v. Missouri Pacific R.R.,
803 F.2d 401 (8th Cir. 1986) 3

Kinkead v. Southwestern Bell Telephone Co.,
49 F.3d 454 (8th Cir. 1995) 5

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) 4

Rath v. Selection Research, Inc.,
978 F.2d 1087 (8th Cir. 1992) 3, 4, 6, 7

Senn v. United Dominion Indus. Inc,
951 F.2d 806 (7th Cir. 1992) 7

Statutes:

Employee Retirement Income Security Act
of 1974 § 510, 29 U.S.C. § 1140 ..... 1-3, 5-7

REASONS FOR DENYING THE WRIT

The considerations governing this Court's review on certiorari are not satisfied here. There is no conflict among the Circuits on the issue presented by this case, and the case satisfies none of the other criteria that would make it a suitable candidate for this Court's review.

The Petition simply does not do justice to the procedural history or the facts of this case. From all that appears from the Petition, one would assume that this case involved only a claim under the Employee Retirement Income Security Act of 1974 (hereafter "ERISA"). (Pet. 4-14) In fact, as is clearly evident from the opinion below (App. 1a-7a), the case that was tried involved primarily allegations of unlawful age and disparate impact discrimination. As the court below noted (App. 2a), a jury found that Petitioner was not discharged on account of his age, and the evidence adduced at trial was more than sufficient to support that verdict. Moreover, the court below correctly held that Plaintiff had wholly failed to present a *prima facie* case of disparate impact discrimination (App. 3a-5a).

The ERISA retaliation claim which the Petition now suggests was the major issue posed by this litigation was substantially an afterthought, comprising five sentences at the end of Petitioner's nineteen page complaint.

The court below properly concluded that, on this record, it was entirely unnecessary to reach out to decide the question whether Section 510 of ERISA gives rise to a private cause of action for retaliation based on informal protests. (App. 5a-6a) While both courts assumed without deciding that such a claim

did exist, the District Court granted a directed verdict on this claim, holding that Petitioner had not established a *prima facie* case. The Court of Appeals chose to premise its affirmance on this issue on prior case law holding that there is no right to a jury trial under ERISA. (App. 6a)

Petitioner strenuously argues that this exceedingly small part of the opinion below cries out for plenary review by this Court. However, even if this Court should be inclined at some point to address that legal question, this is manifestly not the appropriate case in which to do so. Here, as the District Court correctly ruled, even assuming there were a private cause of action for retaliation based on informal protests under Section 510, the evidence produced at trial was as a matter of law wholly insufficient to establish a *prime facie* case.

Accordingly, since the district court record fully supports the decision below as to that case-specific issue (Petitioner's Issue 3), this case is simply not an appropriate vehicle for this Court to use to address the broader legal issues posed (Petitioner's Issue 1 and Issue 2).[1] In sum, none of the considerations governing review on certiorari (Sup. Ct. R. 10) support review here.

---

[1] As if to confirm that the evidence at trial was insufficient to establish a *prima facie* case, the Petition contains three separate references (at 4, 6, and 13) to non-record materials regarding a proceeding in the United States Tax Court involving Onan's retirement plan. The Tax Court proceeding was brought by a different plan participant years after Petitioner resigned his employment with Onan. Petitioner's only "role" in that proceeding has been confined to contributing to adverse press coverage of Onan's retirement plan by making false statements to the media. In any event, this non-record material simply is not properly before this Court and should not have been referred to in the Petition.

Since The District Court Properly Granted A Directed Verdict On The Retaliation Claim, This Case Does Not Present A Proper Occasion To Address The Legal Issues Argued In The Petition.

In the district court, Petitioner presented a single "retaliation" claim, purportedly based upon the Age Discrimination in Employment Act, the Minnesota Human Rights Act, and ERISA. Petitioner alleged that he engaged in protected acts beginning with his age discrimination charge in 1984, and continuing with his protests to changes in the pension plan beginning in 1988, for which Onan allegedly retaliated many years later. The district court directed a verdict on this claim,[2] primarily because Plaintiff could not establish the required causal connection between protected conduct and alleged retaliation from 1984 forward.

This Court need not decide whether a private right of action for retaliation exists under § 510 of ERISA. As the district court correctly ruled in granting a directed verdict, the evidence simply did not support such a claim under ERISA. ERISA § 510 claims are analyzed under the three-stage framework used under Title VII and other federal civil rights statutes. *Rath v. Selection Research, Inc.*, 978 F.2d 1087, 1089 (8th Cir. 1992). That is, the plaintiff must make out a *prima facie* case of discrimination by showing that the plaintiff engaged in protected activity, that his employment was adversely affected by the defendant, and that there is a causal relationship between the adverse action and the protected activity. *Rath*, 978 F.2d at 1090; *Jackson v. Missouri Pacific*

---

[2] Contrary to the Petition (at 4), the directed verdict was not *sua sponte*, but rather in response to a formal motion by Respondent.

R.R., 803 F.2d 401, 406-7 (8th Cir. 1986). Under the three-stage analysis used to analyze discrimination claims, the burden shifts to the defendant to articulate a legitimate nondiscriminatory reason for its actions only if the plaintiff succeeds in making out a *prima facie* case of discrimination. *Rath*, 978 F.2d at 1089-90; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Here, Petitioner did not establish any adverse conduct by Onan. The evidence was uncontradicted that Petitioner resigned rather than accepting an equivalent assignment after his position was eliminated.

Furthermore, Petitioner certainly did not establish a causal connection between any statutorily protected conduct and retaliation at the time of, or after, the conduct. The record in this case is clear that Petitioner's position was eliminated in a company-wide reduction-in-force. The record is entirely devoid of any evidence that Petitioner's position was eliminated because of his previous charge of discrimination many years earlier, or any of his complaints regarding the changes to Onan's pension plan. Petitioner's previous charge of age discrimination occurred in 1984, eleven years prior to his leaving the company. He had been a vocal opponent of the pension plan changes since 1988. The elimination of his position did not occur until 1995. The length of time between the protected conduct and the purported consequence is, in itself, sufficient to negate the notion of a causal connection between the two.

Consideration of the events that took place between Petitioner's protected conduct and the end of his employment at Onan makes the absence of a causal connection even more

clear. The timing of the decision to eliminate Petitioner's position bears no relationship to his previous claim of age discrimination and his on-going complaints regarding Onan's changes to its pension plan. Despite his activities and complaints, he weathered reductions-in-force in 1985, 1989, 1992, and 1994. In 1993, the department for which Petitioner worked was moved from Fridley, Minnesota to Onan's facility in Huntsville, Alabama. Petitioner was to be transferred to Huntsville with the department. He asked to be assigned to another department, in order to stay at the Fridley plant. Rather than forcing him to either accept the move or resign, Onan allowed him to remain in its employ by placing him in another department. If Onan truly wanted to retaliate against Petitioner, it could have simply terminated him after he refused to transfer to the Huntsville facility, or included him among one of the several pre-1995 reductions-in-force. It did not. Instead, it gave him a raise virtually every year.

To state a claim under 29 U.S.C. § 1140, a plaintiff is required to show a causal connection between activity protected by ERISA and an adverse employment action. *Kinkead v. Southwestern Bell Telephone Co.*, 49 F.3d 454, 456 (8th Cir. 1995). As the district court aptly reasoned:

> [I]t's impossible for me to believe, and I will not ask the jury to conjecture that [it took Onan] 11 years to retaliate. A corporation can figure out if it wants to retaliate a whole lot faster than over an 11-year period . . . . There's no indication that the people involved [in eliminating Petitioner's position] knew that he had filed that age claim.

With respect to the claimed retaliation for pension protests, the court noted,

> The problem here is, [Petitioner's] activities concerning an ERISA plan are of long record. And again, there is no evidence showing that what happened to him was a result of this as differentiated from every other person who is in a protected age class. All of the age discriminatory evidence . . . relates to his confederates, and there's no indication whatsoever that his confederates were also among those who . . . protested about the pension plan . . . . [O]nce again, it beggars the imagination that it took [Onan] 11 years to get rid of a troublemaker if the troublemaker they were unhappy about was complaining about an ERISA plan, and I don't have evidence to support that.

The relevant case authorities fully support the district court's conclusion that a multiple year gap between the act which supposedly triggered retaliation, and the employee's decision to leave employment, is simply too tenuous to support an inference of causal relationship. This is particularly true here in light of the intervening events and reductions in force which did *not* affect Petitioner. *See e.g. Figgous v. Allied/Bendix Corp.*, 906 F.2d 360, 362 (8th Cir. 1990); *Rath*, 978 F.2d at 1090

To be sure, there may be cases where the proof at trial is such that a causal link may be shown through facts other than

proximity and timing. *But this is not such a case -- there was no such evidence here, and Petitioner cites none.*

Accordingly, since Petitioner simply failed to present enough evidence to get to a jury on the ERISA retaliation claim, this is not an appropriate case for this Court to reach out and decide two abstract issues of law: whether a claim for such retaliation even exists, and if so, whether a jury trial is required for such a claim. If and when a case comes before this Court on a proper record raising such issues, the Court may wish to decide those legal issues. This is manifestly not the right case in which to do so.

Finally, it bears noting that the single reported appellate decision Petitioner cites in support of his arguments under § 510, *Grottkau v. Sky Climber, Inc.*, 79 F.3d 70 (7th Cir. 1996), affirmed a summary judgment against the plaintiff/employee, since he could not meet his burden to show that the legitimate reasons offered for his termination were mere pretext. That decision contains no analysis of whether private claims under § 510 should be recognized, nor does it say anything at all about a right to a jury trial. Either the issues were never raised there, or else the 7th Circuit Court concluded, just as the Eighth Circuit Court did in *Rath*, that such an analysis was unnecessary given the plaintiff's failure of proof.

The other two appellate decisions cited by Petitioner on this point--*Senn v. United Dominion Indus. Inc*, 951 F.2d 806 (7th Cir. 1992), and *Bugher v. Feightner*, 722 F.2d 1356 (7th Cir. 1983)-- involve entirely different sections of ERISA. More important, both cases turn solely on whether adding what both courts characterize as an equitable claim under ERISA to an action at law for damages under the Labor Management

Relations Act will deprive a party of the right to a jury trial that unquestionably would have applied to the latter claim had it been brought alone. Therefore, not only do those decisions have nothing whatever to do with the issue in this case, they also do not in any way support Petitioner's contention that there is a conflict in the Circuits that this Court must remedy.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully submits that this case does not merit further review. Accordingly, we respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,
BASSFORD, LOCKHART, TRUESDELL & BRIGGS, P.A.
John M. Anderson
Counsel of Record
Charles E. Lundberg
3550 Multifoods Tower
33 South Sixth Street
Minneapolis, MN 55402
(612) 333-3000

Attorneys for Respondent